PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA, Complainant, v. DUKE ENERGY PROGRESS, LLC, Defendant.	Proceeding No. 20-293 Bureau ID No. EB-20-MD-004

REPLY LEGAL ANALYSIS IN SUPPORT OF POLE ATTACHMENT COMPLAINT

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA

By Counsel:

Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street, NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Date: December 18, 2020

TABLE OF CONTENTS

* Certain information in this Pole Attachment Complaint Reply Legal Analysis and its supporting Affidavits has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Adminstrative Decisions

Miscellaneous

I. INTRODUCTION AND SUMMARY

Duke Progress's Answer confirms that the Commission should apply its new telecom rate presumption to force Duke Progress to reduce its egregiously high pole rental rates. Duke Progress admits that it has been charging AT&T rental rates that have averaged over [redacted] *times* the approximately $7.40 new telecom rental rate that applies to AT&T's competitors. And it does not come close to rebutting the Commission's presumption that that same new telecom rate should be charged to AT&T, let alone provide clear and convincing evidence that AT&T receives net material benefits under the JUA that advantage AT&T over its competitors.

Lacking any legal or factual basis for its exceptionally high pole attachment rates, Duke Progress tries to sow confusion, obscure the facts, and re-argue settled precedent. Duke Progress's Answer takes issue with the presumption itself (arguing that it can never apply to existing attachments made to existing poles under existing agreements); claims that the 2000 Joint Use Agreement ("JUA") between AT&T and Duke Progress is not a "pole attachment contract" even though it governs each party's pole attachments; attributes to AT&T space on the pole that AT&T does not use, such as safety space and unused space below AT&T's facilities; and calculates its proposed "new telecom" rate by multiplying a 1-foot new telecom rate by both the space occupied and constructively occupied by AT&T. The Commission has already rejected each of these arguments and rate formula manipulations to eliminate "outdated rate disparities" that persist under existing joint use agreements.

Duke Progress seeks to rebut the new telecom rate presumption by offering hypotheticals that are not grounded in fact or supported by any actual data, factual claims riddled with error, and its own stated preference that AT&T should pay the JUA rates until AT&T removes its facilities from more than 148,000 poles, regardless of Commission rulings. Indeed, Duke

Progress relies on a single cherry-picked and redacted license agreement as purported "evidence" of AT&T's competitive advantages,[1] while it hides about 45 license agreements that have governed AT&T's competitors over the last decade.[2] It provides no source data to substantiate its claims, questions why it was not enough during the parties' negotiations to simply allege without support or quantification that "advantages" exist, and accuses AT&T of bad faith because AT&T held firm in its request for a just and reasonable rate that would set it on par with its competitors.

But all its writing and revisionist history cannot conceal that Duke Progress is trying to turn back the clock on the Commission's deployment and competition initiatives. For a decade, the Commission has worked to "establish rental rates for pole attachments that are as low and close to uniform as possible … to promote broadband deployment."[3] Duke Progress argues that AT&T should instead pay about [redacted] more per pole than its competitors, amounting to about a [redacted] million annual overpayment. Duke Progress defends this extraordinary premium with dubious attempts to quantify: (1) the difference between a hypothetical world in which Duke Progress shares poles with communications attachers and one in which it does not, (2) pole space that AT&T does not occupy and that cannot be assigned to communications attachers under longstanding FCC precedent, and (3) the unsubstantiated cost of work Duke Progress does *not* perform for AT&T. Each of these arguments is contrary to the Commission's objectives and the principle of competitive neutrality that has motivated its rate reforms. None differentiates AT&T

[1] Answer Ex. 7 at DEP000198-243.

[2] *See* Duke Progress Objection to Interrog. No. 3 (stating that Duke Progress has "approximately 50" license agreements); Duke Progress Response to Interrogs., Ex. 2 at DEP000007-110 (producing 3 license agreements).

[3] National Broadband Plan at 110 (2010).

from its competitors or detracts in any way from the fundamental principle that an approximately $7.40 new telecom rate will "fully compensate [Duke Progress] for costs caused by third-party attachments," including AT&T's.[4]

The Commission should soundly reject Duke Progress's arguments, enforce the new telecom rate presumption, and refund the excess amounts Duke Progress has unlawfully collected since 2017. In so doing, the Commission will take a valuable step forward in its decade-long effort to promote deployment through competitively neutral rates.

II. ARGUMENT

A. Duke Progress Seeks To Reverse the 2018 *Third Report and Order* and Undo Decades of Precedent.

Duke Progress's Answer disregards a decade of Commission rate reforms and even argues the rate reforms are unlawful and unreasonable—recalling the hobgoblin of little minds.[5] The Commission's new telecom rate presumption was adopted for precisely this reason: to ensure that "similarly situated attachers … pay similar pole attachment rates for comparable access" in spite of the intransigence of electric utilities.[6] Duke Progress's Answer confirms that the new telecom rate presumption applies, and that Duke Progress cannot lawfully charge its far higher rental rates.

---

[4] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5321 (¶ 183 n.569) (2011) ("*Pole Attachment Order*") (quoting National Broadband Plan at 110).

[5] *See, e.g.*, Answer ¶ 35 (still challenging the lawfulness of the 2011 *Pole Attachment Order* that was affirmed on appeal); Affirmative Defense 13; *see also* Ralph Waldo Emerson ("A foolish consistency is the hobgoblin of little minds…").

[6] *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7768 (¶ 123) (2018) ("*Third Report and Order*").

1. The Commission's New Telecom Rate Presumption Applies to Existing Agreements, Including the JUA.

Duke Progress tries to avoid application of the new telecom rate presumption to the JUA with three specious arguments that would require the Commission to reverse almost a decade of precedent. *First*, Duke Progress argues that the JUA is not a "newly-renewed" agreement entitled to the presumption because it "cannot be 'renewed'" and cannot be placed "in 'evergreen' status."[7] This argument fails quickly.[8] The new telecom rate presumption applies to "newly-renewed" agreements, including "agreements that are automatically… *extended*…" following the *[Third Report and] Order*'s effective date.[9] The JUA automatically "extended" *after* the effective date of the Commission's *Third Report and Order*.[10] Its terms provide it "*shall continue* in force" until it is terminated upon one year's written notice.[11] The words "continue" and "extend" are synonyms.[12] And Duke Progress admits that the JUA "continues in effect today."[13] Thus, the JUA automatically extends every day that neither party provides a one-year written notice of termination.[14]

---

[7] *See* Answer ¶¶ 11, 21.

[8] Memorandum Opinion and Order at 6-7 (¶ 15), *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (Nov. 23, 2020) ("*Potomac Edison Order*").

[9] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) (emphasis added).

[10] Compl. ¶ 11.

[11] *See id.*; Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[12] *See* Compl. ¶ 11 ("'Continue' means '[t]o carry further in time, space or development: *extend*' and 'extend' means 'to lengthen, prolong; to *continue* …'") (citations omitted).

[13] Answer ¶ 21.

[14] At a minimum, the JUA automatically extends every year, as it requires one year's written notice of termination. *See* Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

Also, Duke Progress is wrong that the JUA cannot renew.[15] The parties agreed that the JUA would automatically renew each day it is not terminated by the parties.[16] Duke Progress is also wrong that the JUA cannot be "placed in evergreen status" *because* it includes an "evergreen" provision.[17] The Commission found to the contrary—that joint use agreements *can be* placed in evergreen status where the agreement may be "terminated and the parties [will] continue to operate under an 'evergreen' clause," meaning a clause that gives "electric utilities ... no right to demand removal of attachments upon termination."[18] The JUA is squarely covered by the new telecom rate presumption.

Second, Duke Progress argues that the JUA is not entitled to the presumption because it is an "infrastructure cost sharing arrangement" with "cost-sharing provisions,"[19] not a "pole attachment contract."[20] This argument should be dismissed summarily. This re-labeling of the JUA is a distinction without a difference and merely recasts electric utilities' stale and rejected argument that the Commission should not apply the presumption to existing JUAs.[21] The JUA is

---

[15] *See* Answer ¶¶ 11, 21.

[16] *See* Compl. ¶ 11 & n.21 ("Renew" means to "repeat so as to reaffirm" or "begin again") (citations omitted).

[17] *See* Answer ¶¶ 11, 21, 27 (arguing that the presumption should not apply because the JUA includes an evergreen provision).

[18] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[19] *See id.*, Executive Summary; *see also* Answer ¶¶ 9, 32, 33, 36.

[20] Answer ¶ 9.

[21] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127) ("We disagree with utilities that argue that we should not apply the presumption to any existing agreements because existing joint use agreements were negotiated at a time of more equal bargaining power between the parties and because [I]LECs receive unique benefits under joint use agreements."). Duke Progress has tried unsuccessfully to recharacterize joint use agreements for nearly a decade in its effort to avoid the Commission's rate reforms. *See, e.g.*, Reply Brief of Petitioners at 16, *Am. Elec. Power Serv.*

a contract that governs the parties' attachments to each other's poles and sets the "rental rates" for that use.[22] Regardless of Duke Progress's characterizations, the JUA is a newly-renewed joint use agreement that the Commission has rightly found is presumptively entitled to a just and reasonable, new telecom rate.[23]

Third, Duke Progress argues that JUA rates should *always* govern existing poles.[24] Again, Duke Progress takes issue with the Commission and again is plainly wrong.[25] The Commission explained that the presumption must apply to existing attachments on existing poles under existing JUAs because there lies the "outdated rate disparities" that the presumption is intended to eliminate.[26] Duke Progress would instead require AT&T to pay the egregiously high JUA rates on more than 148,000 poles in perpetuity—or incur the cost to deploy an unnecessary, unwanted, and duplicative pole network.[27] Nothing could be more contrary to the Commission's

---

Co. v. FCC, No. 11-1146 (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements … are infrastructure cost sharing agreements").

[22] *See, e.g.*, Compl. Ex. 1 at ATT00102 (JUA, Art. XIII).

[23] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127).

[24] *See, e.g.*, Answer ¶ 31 ("DEP denies that AT&T is entitled to the new telecom rate with respect to any existing joint use poles at any time in the past or on a going-forward basis.").

[25] *Third Report and Order*, 33 FCC Rcd at 7767, 7770 (¶ 127 & n.479) (rejecting argument "that we should not apply the presumption to existing agreements"); *see also id.* at 7731 (¶ 50) (a federal statutory right "may not be defeated by private contractual provisions").

[26] *Id.* at 7770 (¶ 127 & n.475). The Commission thus again rejected Duke Progress's argument that "just and reasonable rates" for existing poles "would be tantamount to forced access at regulated rates" contrary to the absence of a right of access for ILECs in the Pole Attachment Act. *See* Answer ¶ 11. In 2011, the Commission explained that "[a]lthough [I]LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, … where [I]LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

[27] *See, e.g.*, Answer ¶ 11 ("AT&T … can remove its facilities from any or all of those 148,000 poles whenever it chooses, and it will no longer be required to pay [the JUA] 'rate' with respect to such poles.").

goal of reducing infrastructure costs to promote deployment.[28] As a result, the new telecom rate presumption does not, and cannot, have an exception for existing poles.

2. Duke Progress Disregards Commission Rulings that Require that Rates Be Set Based on the Space Occupied on the Pole.

Because the presumption applies, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[29] Duke Progress admits it has been charging AT&T's competitors a new telecom rate averaging about $7.40.[30] But it argues that if it is forced to charge AT&T a new telecom rate, that rate should be multiplied by [redacted] to account for the allegedly greater space AT&T uses on the pole as compared to its competitors.[31] Duke Progress is wrong on many counts.

Duke Progress claims that AT&T occupies [redacted] feet of pole space (which it rounds down to arrive at its [redacted]-foot multiplier) by combining 3.33 feet of safety space "constructively occupied" on the pole with [redacted] feet of space purportedly "physically occupie[d]."[32] Neither part of Duke Progress's calculation is accurate.

First, the safety space is attributable to Duke Progress, not to AT&T. Commission rules permit Duke Progress to charge attachers only for the physical space occupied by their attachments on the pole,[33] which is the "Space Occupied" input to the "Space Factor" in each

---

[28] Reply Ex. F at ATT00440-443 (Aff. of C. Dippon, Dec. 16, 2020 ("Dippon Reply Aff.") ¶¶ 10-17, 76).

[29] 47 C.F.R. § 1.1413(b).

[30] Answer ¶ 12.

[31] *Id.*

[32] *See* Answer, Executive Summary at i; *see also id.* ¶¶ 12, 15, 22, 25, 31; *see also* Answer Ex. A at DEP000248, DEP000250 (Freeburn Decl. ¶¶ 9, 13).

[33] *BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 16) (EB 2020) ("*FPL 2020 Order*") (emphasis added) ("[Safety] space should

FCC rate formula.[34] Consistent therewith, "the Commission has long held that the communication safety space is for the benefit of the electric utility, not communications attachers."[35] Duke Progress concedes as much when it comes to AT&T's competitors, acknowledging that it cannot charge them for the safety space because it "is usable and used *by the electric utility*."[36] Yet, somehow Duke Progress argues that AT&T is the cause of and should be allocated that space, despite the Enforcement Bureau's contrary ruling.[37] The Commission should disregard Duke Progress's plea to ignore its prior rulings.

Second, Duke Progress argues that AT&T should be charged for unoccupied space *below* its facilities if they are not attached at the absolute lowest point possible on the poles.[38] But under the Commission's rate formula, 'space occupied' means space 'actually occupied' on—

---

not be attributed to AT&T because … AT&T's attachments do not actually occupy the communications safety space.").

[34] 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); *see also* 47 C.F.R. § 1.1406(d)(1) (calculating cable rates based on "Space Occupied"); 47 C.F.R. § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "Space Occupied").

[35] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16).

[36] Answer ¶ 12 n.38 ("[G]iven that the Commission has already determined that CATV and CLEC attachers should not bear this cost, this cost must fall to AT&T ...."); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (holding "the 40-inch safety space … is usable and used by the electric utility"); *Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 FCC.2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied").

[37] *See* Answer ¶¶ 12, 16, 25, 31. In fact, the "safety space" is rarely even adjacent to AT&T's facilities, which are typically the lowest on the pole, whereas the safety space divides Duke Progress's facilities from the highest communications attachments on the pole. *See* Reply Ex. C at ATT00395 (Reply Aff. of M. Peters, Dec. 18, 2020 ("Peters Reply Aff.") ¶ 15); Reply Ex. F at ATT00446 (Dippon Reply Aff. ¶ 22).

[38] *See* Answer ¶ 12, 16, 25, 31; Answer Ex. A at DEP000248 (Freeburn Decl. ¶ 9); *id.* at DEP000250-251 (Freeburn Decl. ¶ 13) (stating that [redacted] feet was the difference between the "average height of AT&T's highest attachment" on a set of 1,039 unidentified poles and 18 feet, which Duke Progress says is "generally" the "lowest point of attachment" on a pole).

i.e., the "actual physical attachment" to—the poles.[39] AT&T's attachments do not "actually occupy" space *below* its attachments.[40] This remains true even if the AT&T's facilities are placed at a height to permit sag in AT&T's cable mid-span (*i.e.*, midway between two poles).[41] Mid-span sag, which can be 50 or more feet from the pole[42] cannot be used to allocate more space to the attacher or charge a higher rental rate.[43] Sag is endemic to all aerial facilities, but it "does not increase the amount of space actually occupied by the attachment" on the pole.[44]

At a minimum, Duke Progress seeks to attribute to AT&T's use, and charge AT&T for, 3 feet of space that AT&T was allocated under a prior superseded agreement, even though the operative JUA does not allocate space to AT&T.[45] This makes no sense. And to charge AT&T a rate based on 3 feet of space allocated under any agreement—operative or not—is also contrary

---

[39] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *Television Cable Serv.*, 88 FCC.2d at 68 (¶ 11).

[40] *Potomac Edison Order* at 18 (¶ 37) (rejecting assumption that an ILEC occupies space below its attachments).

[41] *See* Answer Ex. A at DEP000251 (Freeburn Decl. ¶ 15).

[42] Reply Ex. C at ATT00398 (Peters Reply Aff. ¶ 23).

[43] *Consolidated Partial Order*, 16 FCC Rcd at 12142-43 (¶¶ 77-78); *see also Implementation of Section 703(e) of the Telecommunications Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6807-08 (¶ 64) (1998) ("[O]verlashing one's own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices.").

[44] *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78); *id.* (¶ 77) ("The statutory language prescribes that we allocate costs based on space occupied, not load capacity."). Duke Progress's claims about the sag experienced by AT&T's facilities is also outdated, and do not account for AT&T's transition to lightweight fiber facilities that are essentially identical to its competitors' facilities. *See, e.g.*, Reply Ex. C at ATT00399-400 (Peters Reply Aff. ¶¶ 25-26).

[45] *See* Answer ¶¶ 8, 12, 15, 22, 25, 31; *see also* Answer Ex. 2 at DEP000140 (superseded 1977 agreement, Art. I.A). *But see* Compl. Ex. 1 at ATT00091-110 (JUA); Reply Ex. D at ATT00421 (Dalton Reply Aff. ¶ 20); Reply Ex. E at ATT00430 (Oakley Reply Aff. ¶ 14).

to the Commission's rate formulas, which are based on "space *occupied*," not space allocated.[46] This makes sense, as allocated space typically diverges substantially from used space,[47] and electric utilities cannot lawfully reserve extra space for ILECs.[48] Calculating rates based on space *physically* occupied thus ensures that attachers are charged for their actual use and avoids the potential for overcharging, undercharging, and double recovery.

Absent statistically valid survey data about the actual average space occupied, the presumption is that communications attachers occupy 1 foot of space.[49] And Duke Progress provided no data whatsoever to rebut the presumption. Rather than facts, it relies instead on a presumption that the average minimum ground clearance for a utility pole is 18 feet[50] and its declarant's unsupported word that a contractor said some AT&T's facilities were placed at about [redacted] above ground on a small number of unidentified poles.[51] Mere conjecture is not evidence

---

[46] 47 C.F.R. § 1.1406(d) (emphasis added); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("[U]nder the Commission's rate formula, 'space occupied' means space that is 'actually occupied'"); *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78) ("determination of the amount of space occupied" is based on "the amount of space actually occupied"); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662) (expecting that ILECs and electric utilities would pay "the same proportionate rate … given [their] relative usage of the pole (such as the same rate per foot of *occupied space*)") (emphasis added).

[47] *See, e.g.*, Compl. Ex. C at ATT00047 (Peters Aff. ¶ 24).

[48] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) ("*1996 Implementation Order*").

[49] 47 C.F.R. § 1.1410; *see also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002).

[50] *In re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6465 (¶ 16) (2000) (cited at Answer ¶ 12); *see also id.* at 6468 (¶ 23) (noting that electric utilities argued that "the lowest attachment on a pole must be at least 19'8" from the ground" and finding an average 18 foot figure accounts for site-specific variables, "such as differing pole heights, … whether the wires or cables cross over railroad tracks, roads, or driveways and the amount of voltage transferred through the cables").

[51] Duke Progress's alleged measurements relate to 1,039 unidentified poles when AT&T uses about 148,000 poles owned by Duke Progress. *See* Compl. ¶ 3; Answer Ex. A at DEP000250

sufficient to rebut the Commission's presumption. New telecom rates for AT&T must be calculated—as they are for AT&T's competitors—based on the Commission's presumptive 1-foot input for pole space occupied.

Duke Progress further inflates the rates it relies on by *multiplying* its new telecom rates by the alleged [redacted] feet of pole space used.[52] This would be improper even if Duke Progress had valid survey data showing that AT&T occupied more than 1 foot of space, on average, on Duke Progress's poles.[53] If a pole owner has sufficient survey data to show that an attacher occupies more than 1 foot of space, on average, it may adjust the "space occupied" input in the rate formula to account for that additional space.[54] It may not calculate a 1-foot rate and multiply it by the amount of space occupied.[55] Doing so would violate the statutory requirement that the unusable space on the pole be *equally* divided among attaching *entities*—without regard to the amount of pole space occupied—and allow the pole owner to substantially over-recover.[56]

(Freeburn Decl. ¶ 13); *see also* Reply Ex. C at ATT00396-97 (Peters Reply Aff. ¶¶ 18-20); Reply Ex. D at ATT00419-20 (Dalton Reply Aff. ¶¶ 17-18); Reply Ex. E at ATT00429 (Oakley Reply Aff. ¶ 12). At best, then, the data reflects about 0.7% of the Duke Progress poles AT&T uses, which were *not* selected for consideration as part of a random, representative, statistically valid, or reliable sampling of a sufficient number of poles throughout the parties' overlapping service area. *See, e.g., Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶¶ 12-13) (1998); *see also* Reply Ex. F at ATT00448 (Dippon Reply Aff. ¶ 26).

[52] *See, e.g.*, Answer ¶ 12.

[53] *See* Reply Ex. A at ATT00353 (Reply Aff. of D. Rhinehart, Dec. 17, 2020 ("Rhinehart Reply Aff.") ¶ 13); Reply Ex. F at ATT00445 (Dippon Reply Aff. ¶ 20).

[54] *See* 47 C.F.R. § 1.1406(d); *see also* Reply Ex. A at ATT00353 (Rhinehart Reply Aff. ¶ 13); Reply Ex. F at ATT00445 (Dippon Reply Aff. ¶ 20).

[55] *See* Answer ¶ 12.

[56] 47 U.S.C. § 224(e)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities"); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6805 (¶ 57) (1998) (rejecting proposal "that entities using more than one foot be counted as a separate entity for each foot or increment thereof" because "[w]e are … convinced that the alternative proposal is inconsistent with the plain meaning of Section 224(e) which apportions the cost of unusable space 'under an equal

3. Duke Progress Cannot Rebut the New Telecom Rate Presumption with Unrealistic Hypotheticals and Alleged Advantages that AT&T's Competitors Also Enjoy.

Duke Progress attempts to rebut the new telecom rate presumption based primarily on its own word—questioning why AT&T did not simply accept its self-serving claim that alleged advantages exist,[57] failing to provide any source data to substantiate its allegations or quantifications,[58] and hiding over 45 of its license agreements.[59] Duke Progress also effectively abandons advantages its executives asserted throughout negotiations, stating that it does not intend to quantify a value for them.[60] These efforts do not provide "clear and convincing evidence" that AT&T receives net benefits under the JUA that materially advantage it over other telecommunications attachers.[61] Therefore, by law, the new telecom rate applies.[62]

---

apportionment of such costs among all attaching entities.'"); *see also id.* at 6800 (¶ 45) ("Under Section 224(e)(2), the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases."); Reply Ex. A at ATT00353 (Rhinehart Reply Aff. ¶ 13).

[57] *See, e.g.*, Answer ¶¶ 9, 15, 28.

[58] *See, e.g.*, Answer Ex. A at DEP000248, DEP000250-251, DEP000260 (Freeburn Decl. ¶¶ 9, 13-15, 34) (alleging measurements from "field surveys" without providing survey data); *id.* at DEP000254, DEP000267 (Freeburn Decl. ¶¶ 20-21 & Ex. A-2) (alleging "costs" without substantiation and admitting "some of the charges do not apply to every attachment"); *id.* at DEP000260-261 (Freeburn Decl. ¶¶ 35-36) (alleging pole replacement and pole construction costs obtained "from our plant accounting department"); Answer Ex. E at DEP000333, DEP000336 (Metcalfe Decl. ¶¶ 19, 26) (basing quantifications on "discussions" with Mr. Freeburn, rather than source data).

[59] Answer ¶ 30 n.134 (describing 1 recent license agreement as an "exemplar"); *see also* Duke Progress Objection to Interrog. No. 3 (stating that Duke Progress has "approximately 50" license agreements); Duke Progress Response to Interrogs., Ex. 2 at DEP000007-110 (producing 3 license agreements).

[60] *See, e.g.*, Answer ¶ 19 ("DEP does not intend to quantify those costs or [alleged] benefits...").

[61] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125); *see also, e.g.*, 7A Fed. Proc., L. Ed. § 17:36 (Clear and convincing evidence is "evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.").

[62] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125).

Duke Progress bases its defense of the JUA rates on "five issues of consequence"[63] that fail under Commission precedent. *First*, Duke Progress claims that AT&T is competitively advantaged because Duke Progress installed 40-foot joint use poles when it could have installed 30- or 35-foot non-joint use poles to meet its own service needs.[64] This argument is specious. Duke Progress "did not build its poles just to accommodate AT&T. By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the Act was amended to provide cable and [C]LECs a statutory right of access."[65] AT&T *and* its competitors require Duke Progress's joint use poles.[66]

Duke Progress tries to salvage this alleged benefit by claiming that AT&T "gained access [to Duke Progress's poles] through a built-to-suit network, rather than expensive make-ready."[67] Duke Progress reasons that, if it had not installed joint use poles, AT&T would have been the first communications attacher seeking to attach—and so AT&T would have had to "pay make-ready costs to replace virtually all of Duke Energy Progress's poles with taller poles."[68] Duke Progress then relies on a flawed and discredited replacement cost methodology to allege that the value associated with its installation of joint use poles is [redacted] per pole per year—the amount

---

[63] Answer ¶ 15; *see also* Answer ¶¶ 8, 10.

[64] *See* Answer ¶ 16 (arguing that "DEP … has always installed poles taller and stronger than necessary to meet only DEP's service needs."); *see also* Answer Ex. C at DEP000298 (Burlison Decl. ¶ 12) ("In other words, where Carolina Power & Light Company [now Duke Progress] installed 40-foot poles to meet the [JUA]'s requirements, in the absence of the [JUA], it could have installed 30 or 35-foot poles.").

[65] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see also Potomac Edison Order* at 13-14 (¶ 32).

[66] *See, e.g.*, Reply Ex. C at ATT00390 (Peters Reply Aff. ¶ 8).

[67] *See* Answer ¶ 10.

[68] Answer Ex. E at DEP000375 (Metcalfe Decl., Ex. E-4.1); *see also* Answer ¶ 15 (defining benefit as the "make-ready costs AT&T avoided through DEP's construction of a built-to-suit network of poles").

it thinks it would have cost if AT&T had replaced all of Duke Progress's poles with taller poles at current day prices.[69]

But Duke Progress cannot charge AT&T higher rates solely because AT&T was the first communications attacher seeking to attach to Duke Progress's poles. Alleged advantages must "derive from the terms and conditions of the joint use agreement rather than [AT&T]'s historical status as an [I]LEC."[70] The JUA at issue here was entered in 2000; by that time, AT&T had facilities attached to over 84% of the joint use poles currently owned by Duke Progress.[71] Duke Progress thus hinges its argument on a *prior* agreement, entered in 1977 and superseded by the 2000 JUA.[72] But Duke Progress's argument is disingenuous even based on the long-replaced 1977 agreement. One of Duke Progress's exhibits shows that, by 1972 (*i.e.*, 5 years before the replaced agreement) [redacted][73] The prior agreement also recognized that AT&T *could* attach to shorter 35-foot

[69] *See* Answer ¶ 8; Answer Ex. E at DEP000338, DEP000375 (Metcalfe Decl. ¶ 30 & Ex. E-4.1) (assuming replacement of 100% of Duke Progress poles to which AT&T is attached at 2019 costs). Of course, AT&T, cable companies, and CLECs have been attaching to Duke Progress's poles for decades, making use of current costs entirely inappropriate. *Ala. Cable Telecommunications Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent's final attempt at appraisal, using replacement costs ... also fails."); *see also* Reply Ex. A at ATT00363-364 (Rhinehart Reply Aff. ¶ 30); Reply Ex. F at ATT00459 (Dippon Reply Aff. ¶ 48).

[70] *See* Letter Order at 4, *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355 (EB May 22, 2020); *see also Potomac Edison Order* at 14 (¶ 32) (rejecting alleged benefits that "relate to the date the JUA was entered into and not to any specific terms and conditions in the JUA").

[71] Compl. Ex. B at ATT00027 (Miller Aff. ¶ 7); Compl. Ex. 7 at ATT00201-02 (Historic pole count records).

[72] *See* Answer Ex. 2 at DEP000138-167 (superseded 1977 agreement).

[73] *See* Answer Ex. 6 at DEP000180.

poles without replacing them.[74] This remains true under the current JUA.[75] And Duke Progress's witness points to a 40-foot pole when describing "typical" Duke Progress construction *without* AT&T or any other third party attached.[76] It is mere fiction to claim that the JUA is the reason for the height of Duke Progress's poles or that AT&T would have had to rebuild Duke Progress's network absent the JUA, let alone rebuild it using modern-day materials at current-day costs.[77] The height of Duke Progress's poles does not competitively advantage AT&T.[78]

Second, Duke Progress claims that AT&T is advantaged because it has a "contractual right to remain attached" to Duke Progress's poles after the JUA terminates.[79] This is not a competitive advantage—Duke Progress admits that AT&T's competitors have an "extracontractual" right to remain attached.[80] Indeed, this statutory right of access post-termination that AT&T's competitors enjoy is *more valuable* than AT&T's contractual right.[81]

---

[74] *See* Answer Ex. 2 at DEP000141 (superseded 1977 agreement, Art. I.B).

[75] *See* Compl. Ex. 1 at ATT00094 (JUA, Art. I.K); *see also* Reply Ex. D at ATT00417 (Dalton Reply Aff. ¶ 13); Reply Ex. F at ATT00461-462 (Dippon Reply Aff. ¶¶ 50-51).

[76] Answer Ex. C at DEP000298 (Burlison Decl. ¶ 14).

[77] *See FPL 2020 Order*, 35 FCC Rcd at 5329-30 (¶ 15) (rejecting "assum[ption] that, without the JUA, AT&T would have built a duplicate pole network. But, as Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is "often no practical alternative except to utilize available space on existing poles.'") (citation omitted); Reply Ex. A at ATT00363-364 (Rhinehart Reply Aff. ¶ 30); Reply Ex. C at ATT00393 (Peters Reply Aff. ¶ 12); Reply Ex. F at ATT00457-463 (Dippon Reply Aff. ¶¶ 46-54).

[78] *See* Reply Ex. F at ATT00462 (Dippon Reply Aff. ¶ 51). It is also pure fantasy to imply that AT&T's competitors needed to replace Duke Progress's poles each time they attached. Reply Ex. C at ATT00391 (Peters Reply Aff. ¶ 9); Reply Ex. D at ATT00417-18 (Dalton Reply Aff. ¶¶ 13-14); Reply Ex. E at ATT00427-28 (Oakley Reply Aff. ¶¶ 8-9); Reply Ex. F at ATT00462 (Dippon Reply Aff. ¶ 51).

[79] Answer ¶ 10.

[80] Answer ¶ 30 n.136.

[81] *See* Answer Ex. E at DEP000329 (Metcalfe Decl. ¶ 9) ("Duke Energy Progress is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC. This represents a fundamental difference

For if Duke Progress terminates a license agreement, AT&T's competitor still has a federally protected right to deploy on new Duke Progress pole lines.[82] If Duke Progress terminates the JUA, AT&T will have no right of access and will need to identify, fund, and deploy alternate infrastructure going forward—and can do so only if the governmental entity will permit.[83]

Third, Duke Progress repeats its claims that AT&T occupies space on the pole that AT&T does not use (such as 3.33 feet of safety space and unused space below AT&T's attachments) and argues that this constructive occupation of space advantages AT&T over its competitors. AT&T's purported use of this space is not an advantage because, as explained above, it is purely contrived by Duke Progress. AT&T does not "physically occupy" any of the safety space or space below its attachments. Duke Progress's third alleged "advantage" is simply another attempt to justify charging AT&T for space AT&T does not occupy, once again contrary to longstanding Commission precedent.[84]

---

between CLECs or CATVs, as compared to ILECs. Without a contractual obligation for a utility to provide access, … ILECs are at a material disadvantage compared to CLECs and CATVs."); *see also* Reply Ex. A at ATT00363 (Rhinehart Reply Aff. ¶ 29); Reply Ex. C at ATT00394 (Peters Reply Aff. ¶ 13); Reply Ex. F at ATT00455 (Dippon Reply Aff. ¶ 42).

[82] 47 U.S.C. § 224(f). Indeed, electric utilities, including Duke Energy Corporation, argued that rental rates should *increase* when pole access became statutory versus via contract. *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1365 (11th Cir. 2002) (rejecting attempt to increase cable rate from $7.47 to $38.81 per pole to reflect the higher value of mandatory statutory access).

[83] *See, e.g.*, Answer ¶ 11 n.30 ("incumbent LECs have no right of access to utilities' poles) (citation omitted). Duke Progress claims the value of this alleged advantage is the current cost to build a duplicative network of poles, which it says is [redacted] per pole. *See* Answer Ex. E at DEP000334, DEP000361 (Metcalfe Decl. ¶ 20 & Ex. E-2). This attempted replacement cost valuation is just as flawed as Duke Progress's alleged [redacted] per pole valuation of the current cost to replace each of Duke Progress's poles with taller poles. *See Ala. Power Co.*, 16 FCC Rcd at 12234 (¶ 57) ("Respondent's final attempt at appraisal, using replacement costs … also fails."); *see also* Reply Ex. A at ATT363-364 (Rhinehart Reply Aff. ¶ 30); Reply Ex. F at ATT00455-457 (Dippon Reply Aff. ¶ 41-45).

[84] *See* Section II.A.2.

Fourth, Duke Progress claims AT&T is advantaged because AT&T "is not required to submit permit applications before making attachments" to Duke Progress's poles.[85] This is not a net benefit, as Duke Progress also does not need to submit a permit application to attach to AT&T's poles and there is no evidence that the parties are deploying their facilities at materially different rates each year.[86] It also does not speed AT&T's deployment as Duke Progress contends.[87] AT&T must collect and compile the same information reflected in Duke Progress's permitting form, must complete the same work before attaching to Duke Progress's poles, and often must wait *longer* than its competitors to begin the required work, which delays AT&T's ability to deploy its facilities.[88]

Duke Progress also tries to create the illusion of value where none exists by arguing that AT&T's competitors pay "costs … incurred by DEP" in connection with their permit applications.[89] Duke Progress does not incur these costs under the JUA because AT&T completes the work at AT&T's cost.[90] Duke Progress nonetheless (1) asks the Commission to ignore "internal costs incurred by AT&T" and focus *only* on "the costs that AT&T is required (or not required) to pay" to Duke Progress and (2) claims that it double-checks AT&T's

---

[85] Answer ¶ 17; *see also id.* ¶¶ 8, 10, 14; Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20).

[86] *See, e.g.*, Compl. Exs. 2-6 (2011-2019 Invoices); Reply Ex. C at ATT00402 (Peters Reply Aff. ¶ 28); Reply Ex. D at ATT00413 (Dalton Reply Aff. ¶ 5); Reply Ex. E at ATT00426 (Oakley Reply Aff. ¶ 5).

[87] *See* Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20).

[88] Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 17); Reply Ex. C at ATT00402 (Peters Reply Aff. ¶ 28); Reply Ex. D at ATT00413-15 (Dalton Reply Aff. ¶¶ 5-8); Reply Ex. E at ATT00426-27 (Oakley Reply Aff. ¶¶ 6-7).

[89] *See* Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20).

[90] Reply Ex. C at ATT00402-403 (Peters Reply Aff. ¶ 29); Reply Ex. D at ATT00413-414 (Dalton Reply Aff. ¶ 6); Reply Ex. E at ATT00426-427 (Oakley Reply Aff. ¶ 6).

inspections.[91] But Duke Progress cannot "charge a higher rate" because an ILEC "performs a particular service itself and incurs costs comparable to its competitors in performing that service."[92] This is true even if Duke Progress decides to double-check AT&T's work, as this is not work Duke Progress must perform under the JUA. Thus, this work cannot be a "net benefit under the JUA."[93]

Fifth, Duke Progress claims AT&T is advantaged because the parties pay for make-ready "based on scheduled (a/k/a 'tabulated') costs as opposed to work order costs."[94] But there should be no cost difference because the JUA states that the scheduled costs reflect "the cost" to perform the relevant work, provides for the costs to be updated annually to reflect cost trends, and authorizes "actual cost" billing should a party refuse a request to update the cost schedules.[95] There is thus no advantage. Duke Progress instead attempts to manufacture a difference by

---

[91] Answer ¶¶ 14, 17.

[92] *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18 & n.67) (EB 2017) ("*Dominion Order*"); *see also* Reply Ex. D at ATT00413-14 (Dalton Reply Aff. ¶ 6); Reply Ex. E at ATT00426-27 (Oakley Reply Aff. ¶ 6); Reply Ex. F at ATT00468 (Dippon Reply Aff. ¶ 63).

[93] *See* Compl. Ex. 1 at ATT00096 (JUA, Art. VI). It is not clear what unnecessary and uncompensated inspection work Duke Progress claims to perform for AT&T, particularly when it admits that it does not perform inspections out of "deference" to ILECs. Answer ¶ 14; *see also* Reply Ex. D at ATT00414 (Dalton Reply Aff. ¶ 7); Reply Ex. E at ATT0042-27 (Oakley Reply Aff. ¶ 6). Duke Progress also inflates its alleged valuation by using unsubstantiated current day costs that "do not apply to every attachment" and are not clearly authorized by its license agreements and by ignoring the exceptionally high JUA rates, which have imposed a [redacted] per pole premium on AT&T for decades that has more than covered Duke Progress's claimed [redacted] per pole charge for AT&T's use of existing poles. *See* Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 21); Answer Ex. E at DEP000377 (Metcalfe Decl., Ex. E-4.2); Answer Ex. 7 at DEP000198-242 (License Agreement); *see also* Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 12); Reply Ex. F at ATT00468 (Dippon Reply Aff. ¶ 64).

[94] Answer Ex. A at DEP000255 (Freeburn Decl. ¶ 23); *see also* Answer ¶ 8.

[95] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶¶ 9-10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

comparing the lowest cost pole replacement under the JUA to an uncorroborated allegation about Duke Progress's average cost to replace poles of all heights *and* to complete all associated work.[96] Its attempt fails to prove anything except the extent to which it will go to try preserve its unjust and unreasonable rental rates.

Although Duke Progress primarily relies on these 5 flawed alleged advantages,[97] it peppers its Answer with 4 other similarly meritless allegations. *First*, Duke Progress suggests that AT&T is advantaged because it pays a per-pole rate.[98] Not so. The Commission's rate formulas "determine the maximum just and reasonable rate *per pole*," so AT&T cannot be competitively advantaged by per-pole rates to which it is legally entitled.[99] And if Duke Progress is charging AT&T's competitors per-foot or per-attachment rates that violate the law,[100] the solution is to correct their rates—not to charge AT&T more.

Second, Duke Progress argues that AT&T is advantaged because it is "almost always the lowermost wireline attaching entity" on the pole, but denies any intention to ascribe value to that position.[101] For good reason. AT&T provided ample evidence that its position increases

---

[96] *See* Answer Ex. A at DEP000256, DEP000260 (Freeburn Decl. ¶¶ 24-25, 35); *see also* Answer Ex. E at DEP000338 (Metcalfe Decl. ¶ 30 n.48) (stating that Duke Progress's "equipment transfer costs" are "a significant component" of its [redacted] cost estimate); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶ 33); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶ 10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[97] Answer ¶¶ 8, 9, 10, 15.

[98] Answer Ex. A at DEP000249 (Freeburn ¶ 10) (alleging that "[t]he rental rate under a pole license agreement is typically a per attachment rate, rather than a per pole rate.").

[99] *Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (emphasis added); *see also id.* at 12173-74 (App'x D-1, D-2) (showing calculation of "maximum rate per pole" under cable formula). This argument also fails for reasons detailed above. *See* Section II.A.2.

[100] *See* Answer Ex. A at DEP000249 (Freeburn Decl. ¶ 10).

[101] Answer Ex. C at DEP000300 (Burlison Decl. ¶ 17); Answer ¶ 19 ("DEP does not intend to quantify those costs or [alleged] benefits…").

AT&T's costs as compared to its competitors[102] and Duke Progress agrees there are "costs and risks attendant to the lowest position on the pole."[103] And although Duke Progress questions why AT&T did not try to change its position on the pole, it admits AT&T *has* done just that—it has asked the Commission to stop electric utilities from barring the placement of other company's communications facilities *below* AT&T's facilities on utility poles.[104]

Third, Duke Progress says AT&T is advantaged because "CATVs and CLECs are often required to pay for pole replacements—even to accommodate an attachment that presumptively occupies only one foot."[105] But AT&T *also* pays for pole replacements it requires when an existing Duke Progress pole does not accommodate its facilities.[106] And the number of times Duke Progress would need to replace a pole to provide additional space for any communications

---

[102] *See, e.g.*, Compl. Ex. C at ATT00045-46 (Peters Aff. ¶¶ 21-23); Compl. Ex. 18 at ATT00234-236 (Damage Reports).

[103] Answer ¶ 19.

[104] Answer ¶ 18; *see also* Reply Ex. D at ATT00421 (Dalton Reply Aff. ¶ 20). Duke Progress speculates that AT&T would benefit from its location on a pole if it does not "need to work through the lines of other attaching entities," Answer ¶ 19, but because AT&T encourages the placement of communications facilities *below* its attachments, AT&T *does* have to work "through" the equipment of other attaching entities, *see* Compl. Ex. C at ATT00045 (Peters Aff. ¶¶ 20-21); Reply Ex. C at ATT00407 (Peters Reply Aff. ¶ 35); Reply Ex. D at ATT00421 (Dalton Reply Aff. ¶ 20). Duke Progress also speculates that AT&T's location on a pole allows its cable to sag, Answer ¶ 19, but there is no evidence that AT&T's facilities sag any more than the comparable facilities its competitor's use, *see* Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); Reply Ex. C at ATT00398 (Peters Reply Aff. ¶¶ 22-23); Reply Ex. D at ATT00421-422 (Dalton Reply Aff. ¶¶ 21-22); Reply Ex. E at ATT00429-430, ATT00432-33 (Oakley Reply Aff. ¶ 13 & Ex. O-1).

[105] Answer ¶ 16.

[106] Compl. Ex. 1 at ATT00097 (JUA, Art. VII.F); *see also* Reply Ex. D at ATT00417-18 (Dalton Reply Aff. ¶ 14); Reply Ex. E at ATT00427-28 (Oakley Reply Aff. ¶ 9).

attacher must be few.[107] Duke Progress says its typical joint use poles are 45-feet tall, when a 37.5-foot pole can accommodate 4 communications attachers.[108]

Finally, Duke Progress claims AT&T is advantaged when Duke Progress replaces an AT&T pole following an emergency.[109] But Duke Progress "admits that AT&T pays for these pole replacements" and that AT&T's competitors do not incur similar costs because they "are not required to own any poles at all."[110] AT&T is thus *disadvantaged* as compared to its competitors, not advantaged.

Duke Progress's attempt to rebut the Commission's new telecom rate presumption fails. Even if it could rebut the presumption, Duke Progress admits that the JUA rates it charges

---

[107] *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Sept. 2, 2020) (arguing that 0.024% of electric utility poles were replaced in 2019 to accommodate an additional communications attacher); *see also* Reply Ex. D at ATT00417 (Dalton Reply Aff. ¶ 13); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[108] *See* Answer Ex. C at DEP000299 (Burlison Decl. ¶ 15); *see also* 47 C.F.R. §§ 1.1409(c), 1.1410 (presuming a 37.5-foot pole can hold 5 attaching entities); *Pole Attachment Order*, 26 FCC Rcd at 5341 (¶ 232) ("capacity is not insufficient where a request can be accommodated using traditional methods of attachment"); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11872 (¶ 16) (2010) ("*Pole Attachment Order NPRM*") (traditional methods of attachment include "line rearrangement, overlashing, boxing, and bracketing"); *see also* Reply Ex. C at ATT00391-392, ATT00405 (Peters Reply Aff. ¶¶ 9, 32); Reply Ex. D at ATT00417 (Dalton Reply Aff. ¶ 13); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[109] Answer ¶ 20.

[110] *Id.* Duke Progress claims that AT&T benefits because it can "rely on DEP crews, equipment, etc. in times of need" to "replac[e] a pole in the middle of the night at a moment's notice." *Id.* ¶ 20. But AT&T does not need to rely on Duke Progress because it already has all the resources required to replace poles following emergencies. *See* Reply Ex. D at ATT416-417 (Dalton Reply Aff. ¶¶ 11-12); Reply Ex. E at ATT00428 (Oakley Reply Aff. ¶ 10). AT&T also pays Duke Progress [redacted] times the cost of these emergency pole replacements. *See* Compl. Ex. 1 at ATT00097, ATT00108 (JUA, Art. VII.E & Ex. B). AT&T's competitors do not bear comparable costs because they "are not required to own any poles at all." Answer ¶ 20; *see also* Reply Ex. C at ATT00408 (Peters Reply Aff. ¶ 37).

AT&T are *higher* than the pre-existing telecom rates,[111] which are the maximum permissible rates. And Duke Progress's admission rests on *inflated* pre-existing telecom rates.[112] The pre-existing telecom rate for use of Duke Progress's poles can only be about $11 per pole, at most, because by rule the pre-existing telecom rate is about 1.5 times the new telecom rate that Duke Progress calculated for AT&T's competitors, which has averaged about $7.40 per pole.[113] In comparison, the [redacted] per pole rates that Duke Progress charges AT&T are exorbitant.[114] There is no set of circumstances under which the rates Duke Progress has charged AT&T are lawful.

B. Even Apart from the 2018 *Third Report and Order*, the New Telecom Rate Was the Just and Reasonable Rate as of July 2011.

Duke Progress takes issue with AT&T's argument that, even without the rate presumption, AT&T has been entitled to a just and reasonable new telecom rate since the July 12, 2011 effective date of the *Pole Attachment Order*.[115] Its arguments, which largely duplicate arguments made in its unsuccessful attempt to rebut the presumption, are rife with error and should be rejected.

---

[111] Answer ¶ 22.

[112] Reply Ex. A at ATT00348-357 (Rhinehart Reply Aff. ¶¶ 4-18).

[113] *See id.* at ATT00349 (Rhinehart Reply Aff. ¶ 5).

[114] *See* Compl. Exs. 3-4 at ATT00154-67 (2017 – 2019 Invoices).

[115] Answer ¶¶ 23-30. Duke Progress suggests that the Commission, in the 2018 *Third Report and Order*, created some "temporal categor[y]" of old agreements that escape the Commission review that was extended to them in the 2011 *Pole Attachment Order*. *See id.* ¶ 21. Not so. The FCC does not "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It must at least "display awareness that it *is* changing position" and "must show that there are good reasons for the new policy." *Id.* (emphasis in original). The Commission certainly showed no such intention here. To the contrary, the Commission took the next step forward to eliminate the outdated rate disparities that persisted despite the 2011 *Pole Attachment Order*. *See Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123).

First, Duke Progress argues that the JUA rates are "just and reasonable" because they were agreed upon.[116] The Commission has previously found that "pole attachment rates cannot be held reasonable simply because they have been agreed to."[117] Duke Progress also questions why AT&T did not challenge the rates immediately after the 2011 *Pole Attachment Order*.[118] AT&T did not have to immediately challenge the rates.[119] It is and was Duke Progress's responsibility to comply with the law. Indeed, it was the lack of voluntary action by electric utilities that led the Commission to take further action in 2018 to eliminate persisting rate disparities.[120]

Duke Progress also claims that the rates are reasonable even though the JUA rate formula effectively divides 100% of the pole cost between AT&T and Duke Progress.[121] But this makes the JUA rate formula *particularly unjust and unreasonable*. Duke Progress has nearly a half million CLEC and cable company attachments on its poles, and yet has never reduced AT&T's share of the pole costs.[122] Duke Progress, as a result, continues to collect over [redacted]% of its pole

---

[116] Answer ¶ 23.

[117] *Selkirk Commc'ns, Inc. v. Fla. Power & Light Co.*, 8 FCC Rcd 387, 389 (¶ 17) (1993).

[118] Answer ¶ 23.

[119] *Dominion Order*, 32 FCC Rcd at 3763 (¶ 28) ("the Commission declined to impose time limits on the filing of pole attachment complaints"); *see also* Pet'rs Br., *Southern Co. Servs. v. FCC*, 2002 WL 34246009, at *40 (D.C. Cir. Apr. 9, 2002) (emphasis added) (admitting that "attaching entities can *always* seek Commission revision of a term" in a pole attachment agreement") (emphasis added); *see also* Reply Ex. B at ATT00380 (Reply Aff. of D. Miller, Dec. 17, 2020 ("Miller Reply Aff.") ¶ 8).

[120] *Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123).

[121] Answer ¶¶ 25, 26; Answer Ex. E at DEP000339 (Metcalfe Decl. ¶ 32 & n.54) (arguing that the JUA rates effectively charge AT&T for [redacted], and Duke Progress for [redacted], of pole costs).

[122] *See* Answer ¶ 12 n.39 (stating that Duke Progress has "approximately 480,481 non-ILEC attachments on DEP's poles"); *see also* Reply Ex. A at ATT00366 (Rhinehart Reply Aff. ¶ 33); *see also* Reply Ex. F at ATT00471 (Dippon Reply Aff. ¶ 69).

cost from AT&T and additional rent from AT&T's competitors, while requiring far more space on the pole than all the communications attachers combined.[123]

Second, Duke Progress argues that "the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is foundational error."[124] The Commission concluded otherwise. In 2011, it explained that because "electric utilities appear to own approximately 65-70 percent of poles," "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates" for ILECs.[125] In 2018, the Commission again found that a decline in ILEC pole ownership necessitated further action to ensure just and reasonable rates for ILECs.[126] And in 2017 and 2020, the Enforcement Bureau confirmed that an electric utility's relatively high rates coupled with its "nearly two-to-one pole ownership advantage" supported an inference of bargaining leverage that justified rate relief for the ILEC.[127] AT&T's earliest records show that Duke Progress had a greater 3-to-1 pole ownership advantage as far back as 1987, which has increased to a nearly 5-to-1 pole ownership advantage today (83% vs. 17%).[128]

---

[123] Compl. ¶ 25 n.65; *see also* Compl. Ex. D at ATT00063, ATT000066-67 (Dippon Aff. ¶ 23 n.42, 31); *see also Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)) (stating that the Commission expected that ILECs and electric utilities would pay "roughly the same proportionate rate given the parties' relative usage of the pole").

[124] Answer ¶ 26.

[125] *Pole Attachment Order*, 26 FCC Rcd at 5327, 5329 (¶¶ 199, 206); *see also* Reply Ex. F at ATT00451-454 (Dippon Reply Aff. ¶¶ 33-38).

[126] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[127] *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 18) (finding rate relief required where the electric utility owns 66% of the jointly used poles); *see also Potomac Edison Order* at 11-12 (¶¶ 25-26) (finding rate relief required where the electric utility has a 4-to-1 pole ownership advantage).

[128] *See* Compl. Ex. B at ATT00027 (Miller Aff. ¶¶ 6-7); Compl. Ex. 3 at ATT00163 (2019 NC Invoice); Compl. Ex. 4 at ATT00167 (2019 SC Invoice); Compl. Ex. 7 at ATT00201 (1987 Pole

Duke Progress also argues that its pole ownership advantage should be ignored because it unearthed an old Bell System Practice from the 1970s stating that [redacted][132] The old document thus evidences a resignation to unjust and unreasonable rates—and not an endorsement of them.[133]

Third, Duke Progress claims that AT&T does not "genuinely lack the ability to terminate" the contract rates because it can remove its facilities from over 148,000 Duke

---

Count Information); *see also* Reply Ex. B at ATT00378, ATT00383-84 (Miller Reply Aff. ¶ 5 n.13 & Ex. M-1).

[129] Answer ¶ 26 (quoting Answer Ex. 6 at DEP000196).

[130] *See* Reply Ex. A at ATT00365-366 (Rhinehart Reply Aff. ¶¶ 32-33); Reply Ex. F at ATT00469-472 (Dippon Reply Aff. ¶¶ 65-69).

[131] Answer Ex. 6 at DEP000185.

[132] *See, e.g., id.* at DEP000182. The Practice explained that [redacted]

[133] *See* Reply Ex. F at ATT00471 (Dippon Reply Aff. ¶ 69).

Progress poles.[134] This argument is a microcosm of Duke Progress's position—pay extraordinarily high pole attachment rates under the JUA or get off Duke Progress's poles. Thankfully, that is not required by federal statute or Commission rules. Instead, "where [I]LECs have ... access" to an electric utility's poles, "they are entitled to rates ... that are 'just and reasonable.'"[135] They need not disrupt their network or rebuild a duplicative one in order to obtain the just and reasonable rates required by law.[136] The Enforcement Bureau thus twice relied on an evergreen clause that, like the clause in the JUA, requires payment of the JUA rates after termination as evidence that rate relief was justified because the ILEC "genuinely lacks the ability to terminate an existing agreement."[137]

Duke Progress also argues that AT&T has not shown that it cannot obtain new just and reasonable rates for the JUA through negotiations.[138] Duke Progress's conduct and arguments prove otherwise. Duke Progress thumbed its nose at relevant precedent,[139] refused to make an

---

[134] Answer ¶ 27 ("If AT&T were to remove its facilities from some or all of DEP's poles, it would no longer be bound to [pay the JUA rates]."); *see also id.*, Executive Summary at ii ("AT&T ... can choose at any time to remove its facilities from DEP's poles."); *id.* ¶ 11 ("AT&T ... can remove its facilities from any or all of those 148,000 poles whenever it chooses and it will no longer be required to pay [the JUA] 'rate' with respect to such poles.").

[135] *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

[136] *See, e.g.*, Reply Ex. F at ATT00451-454 (Dippon Reply Aff. ¶¶ 33-38).

[137] *See FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11); *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 30 FCC Rcd 1140, 1150 (¶ 25) (EB 2015) ("*FPL 2015 Order*") (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)); *see also Potomac Edison Order* at 10 (¶ 23).

[138] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216); *see also* Answer ¶ 27.

[139] *See, e.g.*, Answer Ex. B at DEP000290 (Hatcher Decl. ¶ 18) (stating that any rate proposal that required Duke Progress to "bear[ ] the entire cost of the safety space ... was a nonstarter" even though the "FCC had already said that the safety space was excluded from the CATV and CLEC rate formula"); Answer Ex. 4 at DEP000173 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]

offer for over 15 months,[140] took the position that AT&T should forever pay the JUA rates for existing attachments,[141] and accused AT&T of bad faith merely because AT&T asked Duke Progress to substantiate its cost-based claims in an effort to *avoid* the need for litigation.[142] When Duke Progress was then forced to make an offer, it [redacted].[143] AT&T is "not required to engage in extended negotiations where the parties apparently are far apart in their analysis of the issues."[144] That is particularly true here, where Duke Progress has

[140] *See* Compl. Ex. B at ATT00028-33 (Miller Aff. ¶¶ 10-17); *see also* Answer Ex. 5 at DEP000173 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]

[141] *See, e.g.*, Answer ¶ 9 ("In two separate face-to-face meetings between representatives of the parties, DEP offered numerous valid reasons to retain the existing cost-sharing relationship …."); Answer Ex. B at DEP000289 (Hatcher Decl. ¶ 17) (during negotiations, Duke Progress would consider the new telecom rate *only* for "poles that are not already in joint use").

[142] Duke Progress seeks to convert negotiations into mere posturing until a pole attachment complaint is filed, the exact opposite of what the Commission intended. *See, e.g.*, Answer ¶ 9 ("Though DEP had not, at the time of those face-to-face meetings, endeavored to perform any kind of precise economic quantification of those competitive advantages, it made clear to AT&T that it would do so if the parties were unable to reach an amicable resolution."); Answer ¶ 15 ("Though we never provided AT&T with any sort of precise quantification of those net benefits, we do not think such an undertaking is … an efficient use of resources outside of a litigated dispute.").

[143] *See* Answer Ex. 4 at DEP000176 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]; *see also Pole Attachment Order*, 26 FCC Rcd at 5297 (¶ 131 n.399) (stating an attacher pays about 7.4% of a pole owner's annual pole costs under the new telecom and cable rate formulas and about 11.2% of a pole owner's annual pole costs under the old telecom rate formula in urbanized areas); *see also* Reply Ex. A at ATT00360-361 (Rhinehart Reply Aff. ¶ 24).

[144] *Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶ 4) (1998).

now been "clear" that it will "never … negotiate[ ] an agreement like [the JUA] if the most it could recover was the one-foot CATV or telecom rate (old or new)."[145]

Finally, Duke Progress argues that AT&T can never be "similarly situated" to its competitors because of two "irreversible" characteristics: AT&T owns poles and is the incumbent provider.[146] The Commission has rejected these arguments time and again, finding in 2011 that ILECs *can be* "comparably situated to telecommunications carriers or cable operators," and presuming in 2018 that they *are* "similarly situated to other telecommunications attachers."[147] AT&T should be paying the new telecom rate.[148]

C. AT&T Should Be Awarded a Properly Calculated Per-Pole New Telecom Rate Effective as of the 2017 Rental Year.

Because Duke Progress has not identified any material advantages that AT&T enjoys over its competitors, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[149] These applicable new telecom rates for AT&T's use of Duke Progress's poles during the 2017 through 2019 rental years are $7.16, $7.30, and $7.84 per pole, respectively.[150]

---

[145] Answer ¶ 21.

[146] Answer ¶¶ 29-30. *But see* Letter Order at 4, *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355 (EB May 22, 2020) (rejecting claim that "alleged … advantages associated with Verizon's historical status as an [I]LEC are relevant to determine whether Potomac Edison's rates are just and reasonable under the Commission's orders and rules.").

[147] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217).

[148] *See* Compl. Ex. D at ATT00052 (Dippon Aff. ¶ 5); Reply Ex. F at ATT00437 (Dippon Reply Aff. ¶ 3).

[149] 47 C.F.R. § 1.1413(b).

[150] Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Reply Ex. A at ATT00348, ATT00357, ATT00368 (Rhinehart Reply Aff. ¶¶ 4, 18 & Ex. R-5).

Duke Progress argues that different new telecom rates apply, but failed to support them with rate calculations.[151] It is nonetheless clear that Duke Progress's rates were not calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)" as required.[152] Duke Progress admits that it has been charging AT&T's competitors a new telecom rate averaging about $7.40 range.[153] But it argues that if forced to charge AT&T a new telecom rate, the rate should average about $[redacted] higher.[154] Duke Progress's tailor-made rates for AT&T must be rejected.[155] AT&T is entitled to a competitively neutral rate calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)" because "*greater rate parity* ... can energize and further accelerate broadband deployment."[156] These new just and reasonable rates should take effect as of the 2017 rental year.[157]

---

[151] *See* 47 C.F.R. § 1.726(b) (requiring Duke Progress to "advise the complainant and the Commission fully and completely of the nature of any defense").

[152] 47 C.F.R. § 1.1413(b); *see also* Reply Ex. A at ATT00348-357 (Rhinehart Reply Aff. ¶¶ 4-18).

[153] *See* Answer ¶ 12.

[154] Duke Progress claims that AT&T should pay new telecom rates of [redacted] per pole for the 2017 to 2019 rental years. Answer ¶¶ 12, 31, 37. Duke Progress also inflates its pre-existing telecom rates, claiming that AT&T should pay up to [redacted] per pole for the 2017 to 2019 rental years, even though the approximately $7.40 new telecom rates Duke Progress charged convert into pre-existing telecom rates of about $11. *See* Answer ¶ 38; *see also* Reply Ex. A at ATT00349 (Rhinehart Reply Aff. ¶ 5).

[155] The primary source of the error is Duke Progress's attempt to multiply the new telecom rates it calculates for AT&T's competitors by [redacted] *See* Section II.A.2. Duke Progress also departs from the presumption that there are 5 attaching entities on its poles, but did not provide any data to support a different value. *See* Answer Ex. D at DEP000308-09 (Harrington Decl. ¶ 16); *see also, e.g.*, *Teleport Commc'ns Atlanta*, 17 FCC Rcd at 19869 (¶ 25) (requiring "statistically valid survey" data that "reflect[s] only those poles in areas where [the attacher] is actually affixed"); *see also id.* at 19866 (¶ 18) (stating that the "survey should be submitted"); Reply Ex. A at ATT00353, ATT00355 (Rhinehart Reply Aff. ¶¶ 12, 14).

[156] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (emphasis added; internal quotation omitted).

[157] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* Compl. Ex. 1 at ATT00106 (JUA, Art. XX.B) ("This Agreement shall be governed by the laws of the State of North

Duke Progress does not challenge the Commission's authority to award refunds, but argues that a shorter refund period should apply.[158] It should not.[159]

First, Duke Progress asks the Commission to ignore the 3-year statute of limitations that applies to actions involving a North Carolina contract[160] and instead apply the 2-year statute of limitations under 47 U.S.C. § 415, which bears no relation to this dispute. Section 415 applies only to a carrier action to recover *lawful* charges and to an action against a carrier to recover damages and overcharges. This dispute is neither.[161]

Duke Progress does not explain why the 2-year statute of limitations under Section 415 is "applicable" to a refund of unjust and unreasonable pole attachment rentals, except to argue that other options are not "applicable."[162] But, as Duke Progress explains, "when there is no statute of limitations *expressly applicable* to a federal statute, ... the general rule is that a state limitations period for an *analogous* cause of action is borrowed and applied to the federal

---

Carolina"); N.C. Gen. Stat. § 1-52(1) (applying a 3-year statute of limitations to an action "[u]pon a contract, obligation or liability arising out of a contract..."). The comparable statute of limitations in South Carolina is also 3 years. *See* S.C. Code Ann. § 15-3-530(1) (applying a 3-year statute of limitations to "an action upon a contract, obligation, or liability, express or implied ...").

[158] Duke Progress correctly acknowledges that, although the Commission declined to create a "right to refunds," but it did not eliminate its authority to award refunds when appropriate. *See* Answer ¶ 32; *see also* 47 C.F.R. § 1.1407(a)(3).

[159] Duke Progress fails to note that a refund would negate one of its complaints—specifically, that it paid JUA rates from 2017-2019 that "vastly exceed" AT&T's annual pole cost as calculated under the FCC's rate formula. *See* Answer ¶¶ 22, 33. AT&T has asked for a *net* refund calculated by applying properly calculated and proportional FCC rates to AT&T's use of Duke Progress's poles *and* to Duke Progress's use of AT&T's poles. *See* Compl. ¶ 37; Compl. Ex. A at ATT00023 (Rhinehart Aff., Ex. R-4).

[160] *See* N.C. Gen. Stat. § 1-52(1); S.C. Code Ann. § 15-3-530(1).

[161] *See* Answer ¶ 32 (relying on 47 U.S.C. § 415) (emphasis added).

[162] *Id.*

claim."[163] As a result, where, as here, the federal claim involves a contract, "contract law provides the best analogy" and the Commission should apply "the general contract law statute of limitations."[164] That statute of limitations in North Carolina (and South Carolina) is 3 years.[165]

Second, Duke Progress asks the Commission to limit refunds to the period following AT&T's May 2019 request for rate negotiations.[166] The Commission, however, has "decline[d] the invitation ... to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[167] Doing so "runs counter to the very idea of a statute of limitations."[168] And regardless, Duke Progress was on notice beginning in 2011 that it was obligated to conform the contract rates to the just and reasonable level as required by law. It should not be rewarded for its failure and refusal to do so.

Third, Duke Progress argues that a refund award should not include years before the *Third Report and Order* took effect because, had AT&T then sought relief, it would have had the burden to prove the rates were "unjust and reasonable."[169] But AT&T *has* satisfied that burden. It presented far more than a *prima facie* case that the JUA rates are unjust and unreasonable—it

---

[163] *Id.* (quoting Compl. ¶ 32) (emphases added).

[164] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018); *see also Potomac Edison Order* at 20 (¶¶ 41-43). Moreover, the Commission could have, but did not, specify a one-size-fits-all federal statute of limitations, further reinforcing that the "applicable statute of limitations" is drawn from state law.

[165] *See* N.C. Gen. Stat. § 1-52(1); S.C. Code Ann. § 15-3-530(1). Duke Progress points to a 3-year statute of limitations applicable to an "action to rescind a contract." *See* Answer ¶ 32 (citing N.C. Gen. Stat. § 1-52(1)). But AT&T does not seek to *rescind* the JUA; it has asked the Commission to set the lawful rates that will apply as the parties continue to operate under the JUA going forward.

[166] Answer ¶ 32.

[167] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[168] *See id.*

[169] Answer ¶ 32.

provided lengthy factual, legal, and economic evidence that "even apart from the 2018 *Third Report and Order*, AT&T was entitled to just and reasonable rates back to 2011."[170] The burden is thus on Duke Progress to justify its rates for all time periods in dispute.[171] That it has not done.[172]

D. Duke Progress's Affirmative Defenses Are Meritless.

Duke Progress concludes its Answer with a series of redundant defenses that lack merit on the facts and the law and improperly seek to relitigate matters that "already fully have been considered and rejected by the Commission" in prior rulemakings.[173] Duke Progress "also fails to adequately to explain in its Answer the factual or legal basis for these defenses and their applicability to this dispute, as the Commission's rules require."[174] They should be rejected.

First, Duke Progress argues that AT&T is barred by estoppel and waiver from seeking a refund for periods prior to May 22, 2019, the date when AT&T asked Duke Progress to negotiate

---

[170] *See* Compl. Section III.C; *see also Cable Television Ass'n of Ga. v. Ga. Power Co.*, 18 FCC Rcd 16333, 16337 (¶ 8) (2003) (finding burden to make a *prima facie* showing satisfied where complaint "could have been more detailed," but "identifie[d] the factual basis of the allegations"); *Selkirk Commc'ns*, 8 FCC Rcd at 389 (¶ 17) (finding burden to make a *prima facie* showing satisfied where complaint alleged that attacher was "required to pay a rate ... that is higher than the regulated rate").

[171] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 19 n.70) ("Once a *prima facie* showing has been made by the complainant, the Commission's pole attachment complaint rules require the respondent to 'set forth justification for the rate, term or condition alleged in the complaint not to be just and reasonable.'") (quoting 47 C.F.R. § 1.1407(a) (2018)); *see also Marcus Cable Assocs. v. Tex. Utils. Elec. Co.*, 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions.").

[172] *See, e.g.*, Reply Ex. C at ATT00409 (Peters Reply Aff. ¶ 39); Reply Ex. F at ATT00439-440 (Dippon Reply Aff. ¶ 9).

[173] *In the Matter of Improving Pub. Safety Commc'ns in the 800 Mhz Band*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

[174] *AT&T Servs. v. 123.net*, 35 FCC Rcd 6401, 6414 (¶ 29) (2020) (citing 47 C.F.R. § 1.721(b), (d), (e) and 1.726(b), (c)).

a just and reasonable rate.[175] Whether estoppel and waiver defenses are available in a pole attachment complaint proceeding is doubtful.[176] But if they were available, they fail. The Commission "decline[d] the invitation ... to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge" because it would "run[ ] counter to the very idea of a statute of limitations."[177]

Second, Duke Progress argues that AT&T is barred by accord and satisfaction, acquiescence, and waiver from seeking a refund for periods prior to 2019 because AT&T paid Duke Progress's invoices in full and agreed that the invoiced rates complied with the JUA's rate formula.[178] Even if these defenses were available in a pole attachment complaint proceeding,[179] they too would fail. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Progress's poles; that AT&T paid rates charged by Duke Progress that were in violation of

---

[175] Answer, Affirmative Defenses 1, 2.

[176] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29) ("[Defendant] has cited no authority establishing that a party may assert equitable defenses in a formal complaint proceeding before the Commission."); *Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including waiver and estoppel, are available in formal complaint proceedings); *see also AT&T Servs. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36 & n.123) (2015) (same).

[177] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[178] Answer, Affirmative Defenses 5, 6, 7.

[179] *But see AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

federal law "is of no consequence."[180] Any other standard "would subvert the supremacy of federal law over contracts."[181]

Third, Duke Progress argues that AT&T's claims are barred in whole or in part by laches, the 2-year statute of limitations of 47 U.S.C. § 415(c), or the 3-year statute of limitations for actions to rescind a contract under North Carolina law.[182] The doctrine of "laches ... do[es] not preclude AT&T from challenging [the] rates."[183] And the applicable statute of limitations is North Carolina's 3-year statute of limitations for contract actions, not the inapplicable statutes of limitations cited by Duke Progress.[184] The statute of limitations also does not and cannot bar relief or limit the Commission's broad statutory authority to "take such action as it deems

[180] *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36) ("[T]he doctrines of waiver, estoppel, laches, and ratification do not preclude AT&T from challenging [the] rates .... AT&T is entitled to receive Defendants' services at rates no higher than what the Commission has determined to be just and reasonable. That AT&T ordered and paid for Defendants' services for a period of time, therefore, is of no consequence."); *see also Southern Co. Servs. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (The FCC must ensure "just and reasonable" rates even if "the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules.").

[181] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

[182] Answer, Affirmative Defenses 3 and 4 (citing N.C. Gen. Stat. § 1-52(1); 47 U.S.C. § 415(c)); Answer, Affirmative Defense 14 (citing laches); Answer, Affirmative Defense 15 (citing the "applicable statute of limitations").

[183] *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36).

[184] *See* Section II.A.C; *Potomac Edison Order* at 20-22 (¶¶ 40-46)..

appropriate and necessary" to ensure just and reasonable rates,[185] but instead sets the effective date of just and reasonable rates under the Commission's remedies rule.[186]

Fourth, Duke Progress argues that it would be inequitable and unconscionable to grant the relief AT&T seeks because it would "unjustly enrich AT&T at the expense of DEP."[187] If these equitable defenses were available in a pole attachment complaint proceeding,[188] they too would fail. "The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to [I]LEC attachments will not result in unreasonably low rates."[189] Instead, the new telecom "rate is just, reasonable, and fully compensatory."[190]

Fifth, Duke Progress argues AT&T's claim "fails to state a claim upon which relief can be granted" under 47 C.F.R. § 1.1413(b) because the JUA "was not 'entered into or renewed' after the effective date of the rule."[191] The new telecom rate presumption codified at 47 C.F.R. § 1.1413(b) applies to "new and newly-renewed joint use agreements," including agreements

---

[185] 47 U.S.C. § 224(b)(1); *AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) ("Under this broad authorization [of 47 U.S.C. § 224(b)(1)], it is hard to see any legal objection to the Commission's selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules.").

[186] 47 C.F.R. § 1.1407(a)(3).

[187] Answer, Affirmative Defenses 8, 9.

[188] *But see AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[189] *FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 19).

[190] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *id.* at 531 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers.... The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate."); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *City of Portland v. United States*, 969 F.3d 1020, 1053 (9th Cir. 2020); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

[191] Answer, Affirmative Defense 10.

"that are automatically renewed, extended, or placed in evergreen status."[192] As stated, the JUA "*shall continue* in force until terminated" upon one year's written notice.[193] "Continue" and "extend" are synonyms, meaning that the JUA has "automatically … extended" after the effective date of the new rule. The new telecom rate presumption applies.[194]

Sixth, Duke Progress asks the Commission to forbear from exercising jurisdiction even though the Enforcement Bureau recently rejected this defense.[195] It should do so again here. The "facts that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles"[196] *are* present in this case because "AT&T is, in fact, in an inferior bargaining position and … the JUA rate is neither just nor reasonable."[197] Duke Progress also has not filed a proper forbearance request and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[198] Forbearance is also precluded by statute because enforcement of AT&T's right to just and reasonable rates is (1) "necessary to ensure that the … regulations … in connection with … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest."[199]

---

[192] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475).

[193] Compl. Ex. 1 at ATT00104 (JUA, Art. XVII) (emphasis added).

[194] *Potomac Edison Order* at 6-7 (¶ 15); *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also* Section II.A.1.

[195] *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19).

[196] Answer, Affirmative Defense 11.

[197] *See FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19); *see also* Section II.A-B.

[198] *See* 47 C.F.R. §§ 1.53-1.59; *see also FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19 n.83).

[199] *See* 47 U.S.C. § 160(a); *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19 & n.83); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (finding "just and reasonable" rates for

Seventh, Duke Progress asks the Commission to waive the applicability of its rules as they apply to ILECs under 47 C.F.R. § 1.3.[200] Duke Progress's request is facially invalid as it has not demonstrated "good cause" or "plead with particularity the facts and circumstances which warrant such action."[201] Nor could Duke Progress meet the applicable standard because "a party seeking waiver of a rule's requirements must demonstrate that 'special circumstances warrant a deviation from the general rule' and 'such deviation will serve the public interest.'"[202] "In order to demonstrate the required special circumstances, [the party seeking waiver] must show that the application of the ... rule would be inequitable, unduly burdensome or contrary to the public interest or that no reasonable alternative existed which would have allowed it to comply with the rule."[203] Duke Progress has not and cannot meet that standard. A "just and reasonable" rate for AT&T's use of Duke Progress's pole cannot be "inequitable."[204] Collection of a "fully compensatory" new telecom rate cannot be "unduly burdensome."[205] And application of the Commission's rules to ensure just and reasonable rates *will "serve the public interest*

ILECs "will promote broadband deployment and serve the public interest [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment").

[200] Answer, Affirmative Defense 12.

[201] 47 C.F.R. § 1.3; *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

[202] *See In the Matter of Results Broad. Rhinelander, Inc. Pet. for Waiver of Final Payment Deadline for Winning Bids in Auction 94*, 34 FCC Rcd 8520, 8522 (¶ 7) (2019) (citing case law interpreting 47 C.F.R. § 1.3).

[203] *Id.*

[204] *See id.*; *see also FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 18) ("'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.").

[205] *See Rhinelander*, 34 FCC Rcd at 8522 (¶ 7); *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110).

[because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment."[206]

Finally, Duke Progress argues that "[t]he rule upon which AT&T's complaint is premised is unlawful, *ultra vires*, arbitrary, capricious and unreasonable."[207] The U.S. Courts of Appeals for the D.C. Circuit and Ninth Circuit disagreed.[208]

III. CONCLUSION

For the foregoing reasons, and those detailed in AT&T's other pleadings, affidavits, and exhibits, AT&T respectfully requests that the Commission grant AT&T's Pole Attachment Complaint, set the just and reasonable rate, effective as of the 2017 rental year, as the rate that is properly calculated in accordance with the new telecom rate formula,[209] and order Duke Progress

---

[206] *See id.*; *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) ("Th[is] Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."). For this same reason, Duke Progress cannot show that no reasonable alternative existed which would have allowed it to comply with the "just and reasonable" rate requirement.

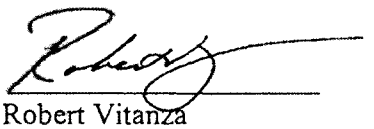
[207] Answer, Affirmative Defense 13.

[208] *See Potomac Edison Order* at 6, 23 (¶¶ 14 n.43, 50); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 19); *see also City of Portland*, 969 F.3d at 1052-53; *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

[209] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11, Ex. R-1). Alternatively, in the unlikely event that the Commission concludes that Duke Progress has met its burden to prove by clear and convincing evidence that the JUA provides AT&T a net material advantage over its competitors, AT&T respectfully requests that the Commission set the just and reasonable rate, effective as of the 2017 rental year, at a rate that is no higher than the rate that is properly calculated in accordance with the pre-existing telecom rate formula. *See id.* at ATT00009, ATT00013-14 (Rhinehart Aff. ¶ 17, Ex. R-1).

to refund all amounts paid in excess of a just and reasonable rate with interest,[210] beginning with the 2017 rental year.

Respectfully submitted,

By: 
Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Attorneys for BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Dated: December 18, 2020

[210] *See id* at ATT00021 (Rhinehart Aff., Ex. R-4). Interest should be awarded at "the current interest rate for Federal tax refunds and additional tax payments." *Cavalier Tel., LLC v. Va. Elec. & Power Co.*, 15 FCC Rcd 17962, 17964 (¶ 4 n.16) (2000).

INFORMATION DESIGNATION

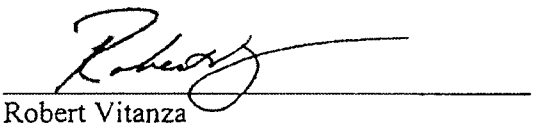
1. The AT&T employees and former employees with relevant information about this rental rate dispute are identified in AT&T's Pole Attachment Complaint, Pole Attachment Complaint Reply, and their supporting Affidavits and Exhibits.

2. Attached to this Pole Attachment Complaint Reply are Affidavits from employees of AT&T and its affiliates and outside expert Christian M. Dippon, Ph.D.

3. AT&T reserves the right to rely on information that is not appended to this Pole Attachment Complaint Reply as additional information becomes available.

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Pole Attachment Complaint Reply Legal Analysis and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, I caused a copy of the foregoing Pole Attachment Complaint Reply Legal Analysis and Affidavits in support thereof to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9050 Junction Drive
Annapolis Junction, MD 20701
(confidential version of Reply Legal Analysis and Affidavits by hand delivery; public version of Reply Legal Analysis and Affidavits by ECFS)

Eric B. Langley
Robin F. Bromberg
Robert R. Zalanka
Langley & Bromberg LLC
2700 U.S. Highway 280
Suite 240E
Birmingham, AL 35223
(confidential and public versions of Reply Legal Analysis and Affidavits by email)

Rosemary H. McEnery
Michael Engel
Lisa Boehley
Lisa B. Griffin
Lisa J. Saks
Federal Communications Commission
Market Disputes Resolution Division
Enforcement Bureau
(confidential and public versions of Reply Legal Analysis and Affidavits by email)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(public version of Reply Legal Analysis and Affidavits by overnight delivery)

North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699
(by overnight delivery)

Public Service Commission of South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210
(by overnight delivery)

Frank Scaduto